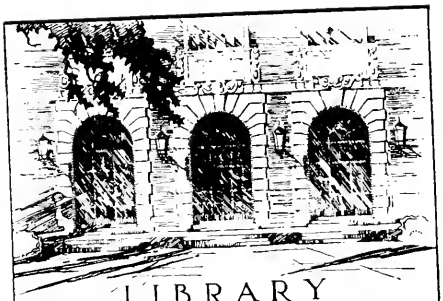

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CONSERVATIVE LAND REFORM.

The Settled Estates Act, 1882.

A PAPER

READ BEFORE THE

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BY

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"Very carefully and judiciously written."—LORD CAIRNS.

THE SETTLED ESTATES ACT, 1882.

I HAVE been asked to write a short paper on the Settled Land Act of Lord Cairns passed during the last Session, and it has been with some diffidence that I have complied with the request made to me. First, because the question involves a consideration of the whole vexed subject of the English land laws,—a subject bristling with difficulties, to lawyers equally as to laymen, and full of problems intimately connected with our social and political life; and secondly, because the topic can at best be inadequately discussed in so short a paper as time will allow, and is likely to fall somewhat flat among the more exciting political questions of the hour.

But, dry as it may be, the subject is one of such immense importance at the present day, partly owing to the enquiries which the recent agricultural depression has naturally set on foot, and partly to the wild and mistaken theories that have been expressed as to our land laws, that I think no apology, save one arising from my own feeling of personal incapacity, is needed for bringing it forward, with a view to invite and promote discussion. At the present time, moreover, when the season of platform politics is at hand, it is as well that we

should have some clear idea what this great measure consists of, what are the evils that it was designed to meet, and how far it is likely to meet them.

In the first place it is important to observe that, in treating of what we may call generically the tenure of land, it is impossible, in an ancient country like our own, to deal with the question as an abstract one. It is not like legislating for a new colony, where land is to be found more than sufficient for the wants of the population, and where all the conditions of life are necessarily different from our own. The modern system of land tenure in England is one that has grown with the growth of the country, and has become, moreover, closely connected with the whole basis of our constitutional government. In it one may find much that a political economist, sitting down to elaborate a perfect system of land tenure, would reject, and very little, perhaps, that he would copy. But, if we are to preserve in any way the continuity of our national life, if England is to continue to be

> "A land of settled government,
> * * * * * * *
> Where Freedom slowly broadens down
> From precedent to precedent,"

the anomalies of the system must be tenderly dealt with, and we should pause before we consent to any wholesale changes which may induce nothing short of social disruption and revolution. This is a thing which political doctrinaires seem to lose sight of when they promulgate the visionary theories which are continually being advocated on Radical platforms and in the pages of Radical magazines. Some of these are so extravagant that they have only to be stated to be refuted. Unfortunately the late legislation, with regard to Ireland, has

been characterised by such a reckless disregard of principles and the rights of property, as to afford a precedent, and almost a justification, for the most extravagant propositions.

Nationalization of the Land.

Were it not for this, it hardly needed Mr. Fawcett's elaborate arguments the other day, to show how entirely visionary was the scheme, recently promulgated at the Trades' Union Congress, for the nationalization of the land—that, in other words, the State should become the sole great landlord, which should mete out to every citizen his holding, and make a great community of small proprietors. Its advocates do not seem to have stopped to consider, quite apart from the immorality involved in such a wholesale confiscation, how they propose to prevent the inevitable operation of the law of supply and demand, without putting a stop to the very thing they wish to encourage, viz., the free alienation of land; or how often a general re-distribution is to take place, if the system is to be a permanent one. Possibly, moreover, the advocates of this theory little realise that they are seeking to restore to a reality one of the most salient features of the feudal tenure they are always inveighing against, viz., the legal fiction that all estates are originally holden by grant from the Crown.

Mill's theory.

Just as mischievous is Mill's theory, that the unearned increment of land should revert to the State. No argument can be cited in favour of such a proposition, which would not equally justify State confiscation of the continually increasing value of the stock of a railway or canal company. Each owes its increased value, not so much to the exertion of its owners as to the increasing wants and demands of the people. Such a scheme, – even if it did not involve, as in justice it ought to do,

the reverse of the proposition, viz., that the State should be answerable to the landlord for any depreciation of land,—would be impracticable to carry out, and would obviously sap the very mainsprings of national enterprise. These are merely instances of the extravagant theories calmly broached and advocated before audiences of unreflecting and ignorant people. But time does not allow more than a passing glance at these questions. Let us turn to consider what objects the State should have in view, and how far it is justified in regulating the tenure of land.

Objects and Limitations of State Interference.

Now, I take it, that it is not the function of the State to interfere with the accumulation of property; in other words, it is not its business to regulate the number of acres a man may hold: neither can the State be concerned to interfere with the power of free disposition of land, so far as such powers are not exercised to the detriment of the community. The only concern of the State is to see: (1) that there is nothing allowed to interfere with the natural economic laws of supply and demand, in the distribution and transmission of land; (2) that such land is so used and cultivated, as to conduce to the best welfare of the community—no doubt, even in England, where the food of the people is, by the operation of free trade, made almost independent of the home supply, it is still important that no obstacle be placed to the proper cultivation of the land, and that land should not be allowed to go out of cultivation; (3) that the great farming interest should be adequately protected, and the capital invested in the soil properly secured; (4) that land shall not be so tied up as to be unsaleable by its owner. These, as far as I understand the proper

functions of the State, are the only justifications for State interference. Everything else is an encroachment on the fundamental rights of property. Now it would, to my mind, be consistent with the traditional policy of Conservatism to further and promote every one of these objects, and so far as these go, to admit the right of the State to interfere. Bearing these axioms in mind, let us see what are the objections to the present land laws most current with reformers at the present day; whether they are justifiable, and how far they may be remedied.

Current Objections to Land Laws.

One never takes up a book or pamphlet on the subject without finding it full of loose invectives against feudal tenure, primogeniture, the law of entail and settlement, and the consequent complexity of titles and difficulties in the conveyance and free trade in land. First, with regard to feudal tenures. Now, these form a very convenient stalking horse; it, no doubt, serves the purpose of platform orators, to paint pictures of a sort of medivæal baron swooping down upon a defenceless tenantry, powerless to resist or obtain redress. How different from the real picture of the landlord, whom Mr. Bright delighted to see, scuttling across the sea from his tenants in Ireland, or meekly obliged in England to shut up his country house and live abroad? But, as a fact, as every lawyer knows,—although some of its incidents, such as the liability to fines and heriots, remain in the case of copyholds, which are continually decreasing in number, and which the tenant can at any time turn into freehold,—all feudal tenures have been abolished in England for two centuries. If, on the other hand, is meant by feudal tenure what may be more properly called *the spirit of feudalism*, that spirit of close

personal attachment and loyalty which happily still exists between many of the great landowners and their tenantry, I, for one, see in it an element of the highest importance to the welfare of the farming interest. The well known aphorism, that property has its duties as well as its rights, is still conscientiously carried out in practice by the majority of the great proprietors, and any thing which would tend to weaken or impair this feeling would only be productive of disaster and ruin to the hopes of agriculture.

Law of Primogeniture.

With regard to the law of primogeniture, again, one would think, to hear the wild abuse that is heaped upon it, that it was a law by which all the younger children of a landowner were necessarily disinherited, and the whole estate vested in the eldest son. It is, in reality, nothing of the kind; *the simple meaning of the word is, that when a man dies without a will, the law presumes an intention on his part to benefit his eldest son at the expense of his younger children.* Now, putting aside the cases where the presumption is a correct one in fact, the instances in which an intestacy happens, when a man dies possessed of considerable property, are very few indeed. No doubt sometimes an unintentional injustice is caused, and I am not going here to justify the law. For my own part, I do not see why the law should not enact that real property should, on the death of the owner intestate, devolve equally amongst his children, as in the case of personal estate and leaseholds. But, if the law on this subject were to be changed to-morrow, it would affect an infinitesimally small number of cases, and would immensely disappoint the hopes of the reformers, who seem to think that if it were abolished, everyone would sit

under his own vine and fig tree, and eat the fruit thereof in peace.

Then comes the system of entail. Now, it is popularly said that by the law of entail, properties are tied up indefinitely and the free alienation of the land checked. But what is the law? Simply this: that, putting aside the one or two cases where estates have been strictly entailed by the State upon families as a reward for public services, *there is no estate tail in England which cannot, the moment the owner of it is of age and sui juris, be turned into a fee simple by the simple process of enrolling a deed in the Chancery Division;* and as the law disallows the tying up of estates for more than a life or lives in being and 21 years afterwards, *it is practically impossible that the system of entail can keep land inalienable for more than a generation.* Entail.

But then it is said, how is it that lands are practically tied up for generations, as is undoubtedly the case? The answer is simple. It is by settlements, which are the result of *agreement* between the parties interested. No doubt these form the very key-stone of the English land system, and it is against this system of settlement that the most formidable attacks are made. Let us see what a settlement of land really is, and what is its object. The object, no doubt, is to preserve the estate in the family; to perpetuate the dignity and position of the head of the family, and to secure the property from being squandered and dissipated. The motive is laudable in itself, and its results far reaching in both a political and social sense. I could cite many authorities in its favour, but space will not allow for more than two. Burke, a statesman unsurpassed in his Settlements. Objects of Settlements.

Burke on Primogeniture.

own age and the present as a political thinker, and a Whig moreover, though of the old type, said: "The custom of primogeniture, without question, has a tendency—I think, a happy tendency—to preserve a character of consequence, weight, and prevalent authority over others in the whole body of the landed interest." The Real Property Commissioners of 1828 considered that "it was a law far better adapted to the constitution and habits of the country, than the opposite law of equal partibility." Take away this power, and in how many cases should we see great estates squandered by spendthrifts too young to have learnt that the position they hold is one they should keep as a trust for their posterity? At present, however extravagant a man may be, he can, at worst, only ruin himself, and not his whole family; and, surely, it would be monstrous, unless it can be shown that the system is dangerous and prejudicial to the State, to deprive our great landowners of these wholesome safeguards.

Real Property Commissioners, 1828.

Nature of Modern Settlements.

Let us see shortly what a modern settlement of land is: (and I may premise here that it is only in the case of large ancestral estates, which perhaps constitute a little more than half of the land in the country, that these strict settlements are usual.) Suppose an estate, held by A for life, with remainder to his eldest son, in tail. On the eldest son attaining 21, or on marriage, the entail is barred, and the father and son join in resettling the property, cutting down the son's estate tail to a life estate, in consideration of his obtaining an immediate allowance from his father, and giving the son's eldest son in turn an estate tail. Provision is made for jointuring the widow of the tenant for life, and for raising portions for his

younger children. By this means the property is tied up again until some tenant in tail comes of age, when the property is again settled. The settlement, moreover, generally contains provisions enabling trustees, with the consent of the tenant for life, to sell the whole or portions of the property, and to reinvest the purchase-money in land, or to apply it in paying off incumbrances. Even when it does not do so, the Chancery Division may, under the Settled Estates Act, direct sales for such purposes. Tenants for life are also enabled to grant ordinary agricultural leases for 21 years, and with the consent of the Court, mining or building leases for longer terms. There is also now power, under various Acts of Parliament, for tenants for life to borrow moneys for improvements, under the sanction of the Inclosure Commissioners, to be repaid by a sinking fund, charged upon the estate. *It will thus be seen that at the moment when a settlement is made, the land may be said to be in the possession of persons who together make an absolute owner, and who can sell or dispose of it as they think fit. That they do not do so is a proof of a strong desire to keep the land in the family, which it would take many acts of Parliament to eradicate.*

Objections to Settlements.

Now the articulate objections to the system of settlements, for in this matter as in many others, radical orators are content to "split the ears of the groundlings" with general invectives without particularising either the evil or the remedy, may be summarised as follows:—(1.) That it prevents estates from coming into the market. (2.) That the owner of the estate for the time being takes it so much encumbered by charges, or so hampered by the limitations of his tenure, that he is left without the means or the incentive to properly cultivate the land.

I am aware that there are other arguments used against the system, which I only mention here, viz., that the system tends to establish in the centre of each family what has been called, somewhat hyperbolically, "a magnificently fed and coloured drone, the incarnation of wealth and social dignity, a sort of great final cause immanent in every family." Others complain, and amongst them the Duke of Somerset the other day, that it places the father in the power of the son. There is to my mind no justification for the first of these objections; and as to the second, if it be true, it is the father himself that has placed himself there, and should not, out of self respect, complain. But in any case, to discuss these in all their bearings, is to open questions of social ethics, too wide to be entered upon here, and I shall confine myself to the two first objections which, in my mind, the State is alone concerned to see to.

First Objection.

No doubt the system of settlement does, as it is designed to do, place a check upon the sale of estates; but the question is, is there any difficulty, in fact, in buying land in England? There is no need of statistics to show that there is none; the daily papers are sufficient evidence of that. The difficulty, indeed, of late years, has been not to find sellers but purchasers of the land, and it is not to be supposed that even if you were to take away every check, and make every landowner an absolute owner, he would at once rush into the market and sell his property. It would, probably, only be the reckless ones, those persons who want to be protected against themselves, who would do so, and it would have but a very small effect upon the value of land. There are causes obvious enough in England which will always keep land clear. Land is a luxury; but its dear-

Real Question.

ness is not due to the law of settlement, but to the deep-seated desire among the wealthy commercial classes to become the owners of land, and gain with it that position which the ownership of land alone confers. It is vain to talk about establishing a peasant proprietary in England. The tendency, in fact, has been all the other way of late years; nor do I think it would be a beneficial change if it could be done. If there is one thing that the evidence taken before the Royal Commission has shown, more clearly than another, it is that much capital and high farming is necessary in England to make the production compete with the virgin soil of America. This would put it out of the power of peasant proprietors to cultivate with any hope of success. Nor is the solution to be found in the infinite subdivision of the land, and the *petite culture* popularly but, I think, erroneously supposed to be so successful on the continent. The climate of England is not adapted to the production of wine or flax; and though the system of market gardens might reasonably be extended in the neighbourhood of large towns, it is vain to suppose, that to the development of this industry, and the increased production and consumption of cabbage and cucumbers, the farmer is to look for his prosperity in the future.

Peasant Proprietors.

Let us take the second objection, viz., that a life tenant is not in a position to do justice to the land or his tenant. If this is so, there is, no doubt, a good cause for State interference. Doubtless, in some cases, a life tenant comes into possession with the estate already heavily burdened with a jointure for his mother, and portions for his younger brothers and sisters, with a large place to keep up, and no spare capital to spend upon the land. Moreover, in some cases, owing to the powers of sale being vested in trustees, and the diffi-

Second Objection:

culty of obtaining their consent, or to the necessity of having to apply to the Court, because of the absence of such powers, there are obstacles in the way of selling any part of the estate, so as to pay off the charges upon it. I do not believe this is often the case, because it is undoubtedly the fact that the estates of our large landed proprietors are the best and most liberally managed in the country, and it is their tenants who have best been enabled to stand the stress of the late unfortunate seasons. An ounce of fact is worth a ton of theory, and the clear result of the evidence taken before the Royal Commission was, that on the large estates, the expenditure of capital was the most generous, and the land was best developed by the application of all the improvements of modern science and mechanics. But it is the few cases, which undoubtedly do exist, where the life tenant is idle or dissolute, or hampered by "the eternal want of pence," that our reformers pitch upon, and arguing from the single to the universal, condemn the whole system, and will be satisfied with nothing less than improving it altogether off the face of the earth.

Evidence before the Royal Commission.

What then are the remedies proposed? "Abolish life estates," say Mr. Kay and Mr. Brodrick. "Take away the right of settling property on unborn persons," says Mr. Shaw Lefevre. "Make everything a fee simple, and let land be as easily transferable as consols," says Mr. Bright. Surely the remedies, or the first two of them (for until Mr. Bright is ingenious enough to invent a method by which a man can take his land to market with him in his pocket, we need not waste much time over the feasibility of his proposition), are worse than the disease. Abolish life estates, and you take away the power of a man to

Proposed Remedies.

give a life estate to his widow or daughter, or to provide against the extravagance of a thriftless son. Supposing a lady possessed of land about to marry, is she not to be allowed to limit the estate to herself for life, with remainder to her child? Must she take the estate absolutely, or, in other words, leave the future of her children dependent on the chances of her husband turning out a provident man? Or, take the case of a man dying leaving an only daughter, is he to be obliged to leave his property unconditionally to his daughter, with the chance of its being dissipated and squandered by her husband? This is clearly an abridgement of the liberty of free disposition of land, which would be intolerable to Englishmen, and disastrous to the social well-being of the country! On the other hand, as has been well pointed out by Mr. Underhill, in his late pamphlet on "Freedom of Land;" the second scheme would not effect the object in view; for, even supposing life estates were allowed, but the property was not to be settled on any unborn persons, except the children of a tenant for life, there is nothing to prevent the very same evil of resettlement which is sought to be abolished.

We are reduced therefore to this, that, granting the embarassments of life tenants, and the evils incident to a limited tenure, some other method had to be discovered to remedy the shortcomings of the law. This is provided and provided in the right way by Lord Cairns' Act. I do not go so far as to say with Mr. Hastings, in his address to the Social Science Congress that this is the greatest revolution, legal and social, that has been accomplished since the Restoration. Revolution it certainly is not, for if there is one thing that is characteristic of it, it is that while

Lord Cairns' Act.

Characteristics of Act.

it is liberal where liberality is needed; it moves on the line I have before indicated, of only so far interfering with the object of the settlement, and the restrictions of limited ownership as is compatible with removing all checks from the saleability and proper cultivation of the land.

Short outline of Act.

I have only time to give a brief outline of its main powers, as an elaborate analysis of it would alone fill a pamphlet. It gives[1] all tenants for life, or if he be an infant his trustees or guardians, or if a lunatic his committee, or if a married woman entitled to the separate use, such married woman, whether restrained from anticipation or not,[2] full power of selling, exchanging or partitioning their lands or any part of them, and[3] conveying the property without the consent of the trustees, very large power of leasing for agricultural, building and mining purposes,[4] and in connection with any sale or lease of building land power to require the laying out of streets, or open spaces, &c.,[5] and power to mortgage any part of the land to raise money for enfranchisement, or equality of partition.[6] All these powers of leasing, with the exception of granting ordinary agricultural leases, would have been impossible before the Act, (except in the cases in which they were provided for by the settlement), without the expense and delay of a petition to the Court. The purposes to which the purchase money received on a sale may be employed are as various as could be desired, and include the discharge of encumbrances, the redemption of land tax, the adjustment of partitions and exchanges, the enfranchisement of copyholds, the purchase of freeholds or copyholds, or the reversion to leaseholds, and even the

[1] Ss. 3 & 4.
[2] Ss. 59, 60, 61 & 62.
[3] Sec. 20.
[4] Ss. 6-13.
[5] Sec. 16.
[6] Sec. 18.

purchase of long leaseholds (the advisability of which seems doubtful), of mines and minerals, and any power or right for mining purposes convenient to be held with the land, in payment to any person absolutely entitled, such as persons entitled to portions—and what constitutes the two greatest innovations—(1) Investment in Government Stocks, and a few other substantial securities named in the Act, or authorised by the settlement as a permanent investment[7] but so that such investments shall, for all purposes of disposition, transmission or devolution, be considered as land under the settlement;[8] and (2) Application of the money to any improvement mentioned in the Act.[7] These improvements comprise almost every operation which can increase the value of land for agricultural, mining, or building purposes,[9] *e.g.*, erection of labourers' cottages, farmhouses, draining, embanking, reclamation of waste lands, erection of mills, building of railways, canals, docks, making of markets, streets, roads, squares, gardens, &c., sinking trial pits for mines, and the reconstruction and repair of any of the above works. But in order to preserve, as far as possible, the rights of remaindermen, and this is where the measure should commend itself to Conservatives, there are elaborate provisions against improvident sales or leases,[10] for setting aside and investing part of fines, mining rents, royalties, and proceeds of cut timber as capital;[11] restrictions against selling the mansion-house, and demesnes therewith enjoyed, except with the consent of the trustees of the settlement or an order of the Court;[12] regulations that, for purposes of investment, the moneys are to be invested by and in the name of the trustees of

[7] Sec. 21.
[8] Sec. 22, sub-sec. 5.
[9] Sec. 25.
[10] Ss. 4, 7, 8 & 9.
[11] Ss. 11, 34 & 35.
[12] Sec. 15.

the settlement, or under the direction of the Court,[13] and the income applied in the same way as rents would have been applied,[14] for settling lands purchased or taken in exchange on the trusts of the settlement;[15] and in order to obviate any reckless schemes of improvement, all such schemes may be submitted to the trustees or to the Court as the case may be, and either the approval of a body of commissioners, to be called the Land Commissioners, or of an engineer or surveyor appointed by them or the Court, or the approval of the Court itself, is to be obtained.[16] An obligation, moreover, is imposed on the tenant for life and his successors to maintain, repair, and insure improvements under rigorous conditions of supervision by the commissioners.[17] There are, moreover, provisions that these powers shall not be assignable to, or exercisable by, assignees of the tenant for life,[18] and a general proviso shewing the spirit of the Act, that a tenant for life shall, in exercising powers, have regard to the interests of all parties interested under the settlement, and be considered a trustee for such persons.[19]

Finally, without going into any more minute analysis of this large measure, which contains 65 long sections subdivided into numerous sub-sections, it is provided[20] that any prohibition against or limitation of these powers in the settlement is to be void, but that nothing in the Act shall abridge or affect any power given by the settlement.

Principles and probable results of Act.

This short description of the Act will suffice to show the lines upon which it is based, viz., of giving to a tenant for life all the powers of management

[13] Sec. 22.
[14] Sec. 22 sub.-sec. 6.
[15] Sec. 24.
[16] Sec. 26.
[17] Ss. 28 & 29.
[18] Sec. 50.
[19] Sec. 52.
[20] Sec. 51.

of the estate that a prudent owner in fee simple could require. Once that is done, the one genuine objection, which has any real weight against settlements, is removed, and the objects which may justify State interference are sufficiently attained. As Conservatives, who have learnt to distrust loud professions and large promises however brilliant and ingenious for the regeneration of mankind, who do not believe that the Saturnian age will return again if entail and settlement are abolished, we can hail this measure as a wise reform, and, as Conservatives, too, we may justly congratulate ourselves, that it is a Conservative measure, instituted by a Conservative ex-chancellor, and passed through the House chiefly by the exertions of Conservatives, that has alone redeemed the last session from the charge of utter barrenness. I do not agree with those who think that the selling powers of the Act will be very largely or generally used, or that the convertibility of realty into personalty will cause land to be looked on as an ordinary investment, and deprive it of its present artificial and sentimental value. The aristocracy and landed gentry are not so short-sighted as to fail to see that the possession of ancestral estates enhances the dignity of their titles and position, and gives them much of their influence and weight in the country, and that while they may slightly increase their income by selling their estates, they will be reducing themselves to the level of the *nouveaux riches* who have amassed gigantic fortunes in trade. Such an act would be one of political and social suicide. The Act perhaps errs in this respect on the side of freedom; but we may trust those in whose hands is the power not to use it so as to compass their own destruction. Whether the measure is likely to be a final settlement of the land question, when

we reflect on the extreme squeezability of the Whig party to the demands of the Radicals, it is impossible to say. But we know what further agitation on the subject means, and what alone it can mean; it means clearly under the guise of a reform in the land laws, to strike a blow against the aristocratic institutions of the country and the existence of the House of Lords. Such an attack will find the Conservative party ready to meet it, and in a better position to do so, now that they have cut a good deal of the ground from under their adversaries. We can, perhaps, scarcely hope to appease with it the advanced guard of the miscalled liberalism of the day, that liberalism which is only another name for democratic despotism, and which has set itself to wage war against freedom of contract, freedom of speech, freedom of voting. Even lately we have heard Mr. Fawcett dilating on the worn out topics of feudal tenure and entail, but not even sparing a word of "faint praise" for this great reform, and other Radicals such as Mr. Arnold and Mr. Mundella condemning it as insufficient and likely to prove ineffective. But whether final or not, it will defer, at all events for some considerable time, the passing of any more drastic measures. The poor landowners, who, amid torrents of abuse from every side, have had to bear the brunt of the late agricultural depression, will breathe again for a while, and when the further attack does come, I trust that this wise and moderate measure of true Conservative statesmanship will have taught the people as well as the landowners, to range themselves on the side of a party which has most identified itself with the real welfare of the land and the great interests connected with it.

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